DWIGHT L. ZUNDEL

IBLA 80-822 Decided February 25, 1982

Appeal from decision of the Burley Idaho District Office, Bureau of Land Management, determining the annual rental charges for communications site under temporary use permit ID-2-TP-9-16 (I-6396).

Vacated and remanded.

1. Federal Land Policy and Management Act of 1976: Permits
The provisions of sec. 504(a) of the Federal Land Policy and Management Act of 1976, 43 U.S.C. § 1764(a) (1976), do not authorize the issuance of temporary use permits absent an existing right-of-way, or for use as a communications site right-of-way.

APPEARANCES: Dwight L. Zundel, pro se.

OPINION BY ADMINISTRATIVE JUDGE LEWIS

Dwight L. Zundel appeals the decision dated January 15, 1980, of the Burley, Idaho, District, Bureau of Land Management (BLM), advising appellant of the revised annual use fee for his communications site under temporary use permit (TUP) ID-2-TP-9-16 (I-6396).

The permit was first issued to appellant in 1972 as a special use permit for a radio repeater site on Chinks Peak, in Bannock County, Idaho. The original permit listed Mitchell Construction as an additional occupier of the site and stated the prime permit holder (appellant) would maintain the equipment and building and enter into a road maintenance agreement with BLM. The annual advance rental was $100. This permit was reissued every subsequent year to 1980. By memorandum dated January 3, 1980, the Chief, Division of Technical Services, advised the Burley District Manager that the $100 fee for appellant's permit was based on an October 1969 appraisal and that pursuant to 43 CFR 2920.4(a) the site had been reappraised, as of January 1, 1980, at a fair market rental of $700 per year.

The decision appealed herein advised appellant that the annual use fee would henceforth be $700, "the same as other users in the area pay." The decision informed appellant that he would be charged the old fee, $100, for

the period March 26, 1979, through March 26, 1980, but that for the ensuing year the $700 fee would apply. Enclosed with the decision was a new TUP application for the renewal of the permit.

On January 22, 1980, appellant replied expressing concern and alarm at the revised rental and stating that he should have been allowed to present evidence that the fee should not have been raised.

On April 1, 1980, BLM sent appellant a copy of its appraisal report and indicated that its appraiser and realty specialist would meet with appellant at an appointed time to discuss the revision of rental. The file indicates that appellant did, in fact, discuss the appraisal with BLM personnel. 1/

On May 6, 1980, appellant filed a formal protest of the increased rental rate. The protest generally challenged BLM's appraisal and stated that there "are many other reasons in which we would like to discuss with you our objections of this rent increase."

In the statement of reasons appellant first asserts that he has only limited control and use of the site and that for this reason the $700 rental is exorbitant. He further asserts that the site does not cover the full communications area and that he is required to maintain two additional sites for complete coverage. Appellant also points out that he must incur costs to maintain the road. He suggests that without road maintenance or the other two sites, $700 would be a tolerable rental.

BLM's appraisal, as of January 1, 1980, was grounded on the comparable lease method. It compared appellant's site to each of four sites under lease and determined which leases were inferior and which were superior to appellant's communications site. The rentals charged for the four leases were then compared and an appropriate rental value for appellant's site was determined to be $700 per year.

While appellant has voiced objection to BLM's valuation he has not shown how the considerations in his statement of reasons affect the value of the site. He has not proffered comparison data which would tend to cast doubt upon BLM's appraisal. Appellant's conclusion that the $700 fee is exorbitant is not equivalent to a demonstration of error in BLM's appraisal procedure.

[1] The first question raised by this appeal is why BLM chose to issue TUP's to appellant for purposes of a communications site. The record does not answer this question, but appellant does indicate, in his letter of May 3, 1980, that BLM was "making arrangements for a right of way." Also, the Deputy Assistant Secretary's letter to one Lynn Broadhead indicates that a right-of-way was involved (as it should have been).

Section 504(a) of the Federal Land Policy and Management Act of 1976 (FLPMA), 43 U.S.C. § 1764(a) (1976), does not authorize the issuance of a TUP for use as a communications site right-of-way. Section 504(a) provides:

1/ See letter dated Apr. 25, 1980, by Assistant Secretary for Land and Water Resources.

> The Secretary concerned shall specify the boundaries of each right-of-way as precisely as is practical. Each right-of-way shall be limited to the ground which the Secretary concerned determines (1) will be occupied by the facilities which constitute the project for which the right-of-way is granted, issued, or renewed, (2) to be necessary for the operation and maintenance of the project, (3) to be necessary to protect the public safety, and (4) will do no unnecessary damage to the environment. The Secretary concerned may authorize the temporary use of such additional lands as he determines to be reasonably necessary for the construction, operation, maintenance, or termination of the project or a portion thereof, or for access thereto.

In James W. Smith, 44 IBLA 275, 280 (1979), we construed section 504(a) and held as follows:

> While the Secretary is authorized to issue TUP's in connection with a right-of-way, the fact that his authority is statutorily constrained to the issuance of TUP's for "additional lands" clearly prevents the utilization of TUP's to accomplish purposes for which a right-of-way may issue. The authorized use for the TUP's herein [for communication sites] was clearly a matter which was properly the subject of a right-of-way. Thus, we hold that it was error to issue the TUP's to Gifford.

Thus, if BLM wishes to license appellant's communications site it must do so under the right-of-way provisions of FLPMA. Where provisions of a statute authorize a specific use, it is improper to use a TUP for the same purpose.

In vacating the decision and remanding the case to the State Office, we note that appellant has not demonstrated by compelling evidence that BLM's appraisal was in error. An appraisal generally may be rebutted only by another appraisal. Dwight L. Zundel, 55 IBLA 218 (1981). Appellant has not made such a showing.

Therefore, pursuant to the authority delegated to the Board of Land Appeals by the Secretary of the Interior, 43 CFR 4.1, the decision appealed from is vacated and the case file is returned to the State Office for further processing consistent herewith.

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Anne Poindexter Lewis
Administrative Judge

We concur:

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C. Randall Grant, Jr.
Administrative Judge

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James L. Burski
Administrative Judge